

Colburn 13

ORIGINAL

1 EDMUND G. BROWN JR.
2 Attorney General of California
3 DENISE FERKICH HOFFMAN
4 Supervising Deputy Attorney General
5 RUSSELL B. HILDRETH
6 Deputy Attorney General
7 State Bar No. 166167
8 1300 I Street, Suite 125
9 P.O. Box 944255
10 Sacramento, CA 94244-2550
11 Telephone: (916) 327-7853
12 Fax: (916) 327-2319
13 E-mail: Russell.Hildreth@doj.ca.gov
14 *Attorneys for Respondent*
15 *Department of Fish & Game*

9 Deborah A. Sivas (Cal. Bar No. 135446)
10 Leah J. Russin (Cal. Bar No. 225336)
11 Karrigan S. Bork (Certified Law Student)
12 ENVIRONMENTAL LAW CLINIC
13 Mills Legal Clinic at Stanford Law School
14 559 Nathan Abbott Way
15 Stanford, California 94305-8610
16 Tel: (650) 725-8571
17 Fax: (650) 723-4426
18 *Attorney for Petitioners*

15 SUPERIOR COURT OF THE STATE OF CALIFORNIA
16 COUNTY OF SACRAMENTO

19 **PACIFIC RIVERS COUNCIL, and**
20 **CENTER FOR BIOLOGICAL**
21 **DIVERSITY, nonprofit corporations,**

21 Petitioners,

22 v.

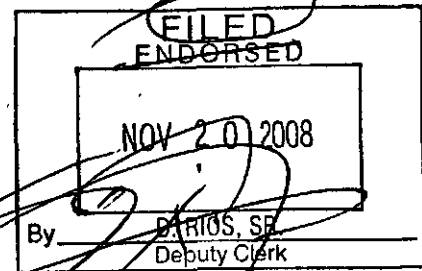
23 **CALIFORNIA DEPARTMENT OF FISH**
24 **AND GAME, a state agency,**

25 Respondent.

06CS01451

ORDER MODIFYING JUDGMENT

Date: November 24, 2008
Time: 11:00 a.m.
Dept: 19
Judge The Honorable Patrick Marlette
Action Filed: 10/6/2006
Judgment Entered: 7/18/2007



1 The Court having considered the motion of the California Department of Fish and Game
2 ("Department") for modification of the Judgment Granting Peremptory Writ of Mandate entered
3 on July 18, 2007, and good cause appearing, IT IS HEREBY ORDERED that:

4 (1) The Court finds that the Department cannot and will not meet the December 31, 2008
5 deadline established in the Judgment for completion of an Environmental Impact Report ("EIR")
6 in connection with its fishing stocking program or the January 15, 2009 deadline for a return to
7 the Peremptory Writ of Mandate. The Department informs the Court that it needs an additional
8 year to satisfy the Judgment and Writ. In anticipation of Respondent's failure to timely satisfy
9 the Judgment and comply with the Writ and to ensure that Respondent will have sufficient
10 additional time to complete an adequate environmental review, the Court exercises its equitable
11 jurisdiction to enforce the judgment, as follows:

12 (A) Respondent shall complete the EIR ordered by the Court and submit a Notice of
13 Determination to the Office of Planning and Research by no later than January 11, 2010; and

14 (B) Respondent shall make and file a return to the Peremptory Writ of Mandate by no
15 later than January 30, 2010.

16 (2) The Court finds that Petitioners have demonstrated a likelihood of interim harm and
17 potentially irreparable harm to native fish and amphibian species and their local populations from
18 the continued stocking of nonnative fish during the extension period granted by this order. The
19 Court further finds that, in order to mitigate this interim harm, equity warrants the imposition of
20 certain protective conditions. Therefore, not later than 15 days after entry of this order and
21 continuing until the Writ is discharged, Respondent shall promptly suspend and thereafter refrain
22 from stocking nonnative fish in:

23 (A) any California fresh water body where monitoring surveys performed for or by
24 the Department have demonstrated the presence of any sensitive native aquatic and amphibian
25 species listed on Attachment A hereto; or

26 (B) any California fresh water body where monitoring surveys for the presence of any
27 sensitive native aquatic and amphibian species listed on Attachment A hereto have not yet been
28 conducted.

1 (3) Reporting.

2 The Department shall submit semi-annual reports by June 1 and December 1
3 outlining mitigation stocking to be done by the Department and generally described in Paragraph
4 4(B) and Paragraph 4(C) of this Order. The Department's report will consist of the following
5 information: the law or agreement directing the stocking activity; number and size of fish
6 stocked, brood stock, and the water body that is stocked. The Department will prepare a yearly
7 report that summarizes the stocking that was actually done and submit it to Petitioner by January
8 15 of the year following the report period. That report will be marked as provisional and
9 confidential until the information is further checked for quality assurance.

10 (4). The following stocking programs are the only programs exempt from the provisions of
11 Paragraph 2 of this order:

12 (A) Permits issued by the Department pursuant to Fish and Game Code section
13 15201:

14 Paragraph 2 of this Order does not affect existing permits issued by the Department
15 pursuant to Fish and Game Code section 15201 for the stocking of fish. Paragraph 2 of this Order
16 also does not affect the renewal or reissuance of permits on the same or similar terms (including
17 amount, location, and species) as the original permit as those permits issued in 2005, 2006, 2007
18 or 2008.

19 (B) Research and education.

20 Paragraph 2 of this Order does not apply to:

21 (i) fish stocking actions that are specifically approved or conducted by the
22 Department to support scientific research under the auspices of a recognized federal, state or
23 local government agency, tribe, or bona fide scientific consultant, school or university; or

24 (ii) the Department's Classroom Aquarium Education Program.

25 (C) Mitigation mandated by law

26 Paragraph 2 of this Order does not apply to:

27 (1) mitigation stocking programs identified in Attachment B, or

28 (2) stocking required pursuant to:

1 (i) FERC licenses or orders,
2 (ii) federal legislation,
3 (iii) state or federal court orders,
4 (iv) required mitigation via a NEPA or CEQA decision document; or
5 (v) a federal ESA compliance decision document or a state CESA
6 compliance decision document.

7 Discretionary enhancement stocking above required mitigation can only occur
8 in compliance with the terms of Paragraph 2 of this order, unless specifically exempted under a
9 separate provision of paragraph 4.

10 (D) Enhancement.

11 Paragraph 2 of this Order does not apply to the anadromous fish enhancement
12 stocking program, as identified in Attachment B.

13 (E) Impoundments.

14 (1) Paragraph 2 of this Order does not apply to human-made impoundments
15 greater than 1000 acres.

16 (2) Paragraph 2 of this Order applies to human-made impoundments less than
17 1000 acres that are hydrologically connected to rivers or other natural water bodies.

18 (3) Paragraph 2 of this Order applies to human-made impoundments less than
19 1000 acres that are within the federally proposed red-legged frog critical habitat or where red-
20 legged frogs are known to exist.

21 (4) Paragraph 2 of this Order does not apply to human made impoundments less
22 than 1000 acres not described in subparagraphs 2 or 3.

23 (F) Projects exempted by CEQA.

24 Paragraph 2 of this Order does not apply to projects exempted by CEQA.

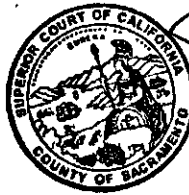
25 (5) Modification of the terms of this order, including its exclusions and attachments. This
26 order, the exclusions specified thereto, and its attachments may be modified by stipulation or
27 agreement of the parties, to be confirmed by order of the Court as a modification of the judgment
28 and writ. The parties may act in reliance upon any such stipulation or agreement prior to

1 confirmation by order of the court. If the parties are unable to agree upon such a stipulation or
2 agreement, after having met and conferred or attempted to do so in good faith either party may
3 request the Court to modify the order. The burden of proof shall be on the party wishing to
4 modify the order.

5 The Court's order, once filed, shall be construed as a modification of the judgment and the
6 peremptory writ of mandate already entered and issued in this matter and may be enforced as
7 such pursuant to Public Resources Code section 21168.9(b) and any other applicable law.

8 IT IS SO ORDERED.

9
10 Dated: NOV 20 2008



11
12
13 Hon. Patrick Marlette

14 Approved as to form:

15 *Leah Russin*

16 Deborah A. Sivas
17 Leah J. Russin
18 Karrigan S. Bork (Certified Law Student)
19 ENVIRONMENTAL LAW CLINIC
20 Mills Legal Clinic at Stanford Law School
21 Attorney for Petitioners

22 *Russell B. Hildreth*

23 Russell B. Hildreth
24 California Attorney General's Office
25 Attorney for Respondent

26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51
52
53
54
55
56
57
58
59
60
61
62
63
64
65
66
67
68
69
70
71
72
73
74
75
76
77
78
79
80
81
82
83
84
85
86
87
88
89
90
91
92
93
94
95
96
97
98
99
100
SA2006303561
30596851 doc

1 confirmation by order of the court. If the parties are unable to agree upon such a stipulation or
2 agreement, after having met and conferred or attempted to do so in good faith either party may
3 request the Court to modify the order. The burden of proof shall be on the party wishing to
4 modify the order.

5 The Court's order, once filed, shall be construed as a modification of the judgment and the
6 peremptory writ of mandate already entered and issued in this matter and may be enforced as
7 such pursuant to Public Resources Code section 21168.9(b) and any other applicable law.

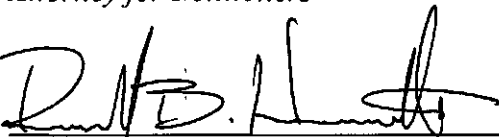
8 IT IS SO ORDERED.

9
10 Dated: _____

Hon. Patrick Marlette

11
12
13 Approved as to form:

14
15 _____
16 Deborah A. Sivas
17 Leah J. Russin
18 Karrigan S. Bork (Certified Law Student)
19 ENVIRONMENTAL LAW CLINIC
20 Mills Legal Clinic at Stanford Law School
21 *Attorney for Petitioners*

22 
23 _____
24 Russell B. Hildreth
25 California Attorney General's Office
26 *Attorney for Respondent*

27 SA2006303561
28 30596851.doc

Attachment A

ATTACHMENT A

Scientific Name

Common Name

Amphibians

<i>Bufo californicus</i>	arroyo toad
<i>Rana aurora draytonii</i>	California red-legged frog
<i>Rana cascadae</i>	cascades frog
<i>Rana boylei</i>	foothill yellow-legged frog
<i>Rana pipiens</i>	northern leopard frog
<i>Rana muscosa</i>	mountain yellow-legged frog
<i>Rana aurora aurora</i>	northern red-legged frog
<i>Rana pretiosa</i>	spotted frog
<i>Ascaphus truei</i>	tailed frog

Fish

<i>Gila bicolor thalassina</i>	Goose Lake tui chub
<i>Mylopharodon conocephalus</i>	hardhead
<i>Catostomus microps</i>	Modoc sucker
<i>Rhinichthys osculus</i> ssp. (2 species)	Owens speckled dace
<i>Gila bicolor snyderi</i>	Owens tui chub
<i>Catostomus santaanae</i>	Santa Ana sucker
<i>Oncorhynchus mykiss aguabonita</i>	golden trout
<i>Oncorhynchus mykiss irideus</i>	southern California steelhead ESU
<i>Oncorhynchus mykiss irideus</i>	south-central California steelhead ESU
<i>Oncorhynchus mykiss irideus</i>	central California steelhead ESU
<i>Oncorhynchus mykiss irideus</i>	summer-run steelhead trout
<i>Oncorhynchus mykiss</i> ssp. (2 species)	McCloud River redband trout
<i>Gila orcutti</i>	arroyo chub
<i>Oncorhynchus tshawytscha</i>	winter run chinook salmon
<i>Oncorhynchus clarkii clarkii</i>	coastal cutthroat trout
<i>Oncorhynchus tshawytscha</i>	spring-run chinook salmon

Attachment B

ATTACHMENT B

Basis and Rationale for the Implementation and Actions Associated with the Operation of our Salmon and Steelhead Hatcheries

The Department of Fish and Game (Department) operates nine Salmon and Steelhead hatcheries. Of these, only the Mad River Hatchery is owned and operated by the Department. The other eight hatcheries are operated by the Department but owned by various state, federal, and private entities. All eight hatcheries were constructed to mitigate the loss of upstream salmon and steelhead habitat and production by the construction of large dams. Mad River Hatchery is the only non mitigation enhancement hatchery the Department operates.

The following hatcheries (Iron Gate, Trinity, and Merced River) raise and release Chinook salmon and steelhead to their natal waters; Klamath, Trinity, and Merced rivers, respectively and are spawned at each hatchery. Iron Gate is owned by PacifiCorp, Trinity is owned by United States Bureau of Reclamation, and Merced is owned by the Merced Irrigation District All three are required mitigation.

Mad River Hatchery is a DFG owned and operated facility that spawns Mad River steelhead to enhance the current populations. The broodstock originated from Mad River and Eel River stock. These fish are reared on-site and released as yearlings. No movement of fish outside of the Mad River basins occurs.

Coyote Valley Fish Hatchery is an Army Corp of Engineers facility that spawns returning steelhead on the Russian River to off-set lost spawning habitat upstream of Coyote Dam. These fish are released at that hatchery when they are yearlings. No transfers or movement of fish outside of their natal waters occurs. This facility is required mitigation.

Warm Springs Hatchery is an Army Corps of Engineers' facility off of Dry Creek, tributary to the Russian River. This facility spawns Dry Creek steelhead which then are released from the hatchery as yearlings. In addition, this facility also has conservation program for coho salmon. Coho salmon are listed as threatened under both the federal and state endangered species act. The coho salmon populations in the Russian River basin are extremely low which warrants a captive breeding program. This program involves a combined multi-agency effort including the Army Corp., National Marine Fisheries Service, and the Department. Coho salmon are captured, spawned, reared and released in six tributaries of the Russian River with the hopes of reestablishing a self-sustaining population.

Mokelumne River Hatchery is a mitigation facility owned by the East Bay Municipal Utilities District (EBMUD) located on the Mokelumne River. Chinook salmon and steelhead runs on the Mokelumne River have been extirpated due primarily to the forming of Camanche reservoir and the loss of spawning and rearing habitat upstream of the dam. To re-establish runs of Chinook salmon and steelhead runs on the Mokelumne River, the Department of Fish and Game utilized fish from two sources, Chinook salmon from Nimbus Hatchery (American River) and steelhead from the Feather River Hatchery (Feather River) were collected and reared at the Mokelumne River Hatchery. It was decided that fish for re-introduction be taken from the Sacramento River system, of which the Mokelumne River is a tributary. While the hatchery has been operating since the late 1950s, and a self-sustaining run of salmon and steelhead return, the Department, at times needs to supplement the egg take to meet EBMUD mitigation goals with American River Chinook and Feather River steelhead eggs.

Nimbus Hatchery is Bureau of Reclamation owned mitigation facility located on the American River at the base of Nimbus Dam. Nimbus Hatchery raises Chinook salmon and steelhead. Chinook salmon production are American River origin fish, thus all progeny are released in their natal waters. Steelhead have been virtually extirpated from the American River since most of their spawning and rearing habitat occurred above the dam. Several strains of steelhead were introduced into the American River in the late 1950's in an attempt to re-establish a run of steelhead and to meet the Bureau of Reclamation mitigation requirement. Some of these steelhead strains were Sacramento River basin origin, while others were out of basin fish. During this time, an out of basin Eel River strain has become self-sustaining and today is the only steelhead fishery in the American River.

Nimbus Hatchery and Feather River Hatchery also allow for production of up to 4 million Chinook salmon total for fishery enhancement purposes. Fish and Game Code Section 7861.3 identifies the production of two million Chinook salmon for fisheries enhancement as the intent of the Legislature with regard to a portion of the fees collected by the Department from the sales of commercial salmon fishing stamps (required for commercial take of salmon in California waters) combined with the Commercial Trollers Salmon Stamp (self imposed tax). In addition, the Commercial Trollers Salmon Stamp Committee has approved funding from the Commercial Trollers Salmon Stamp account of an additional 2 million enhancement fish. Fish produced for enhancement by Feather River and Mokelumne River Hatcheries are typically planted in San Pablo Bay or provided to net pen programs in Monterey Bay, Avila, and Tiburon.

DECLARATION OF SERVICE BY OVERNIGHT COURIER

Case Name: **PACIFIC RIVERS COUNCIL et al. v. CALIFORNIA DEPARTMENT OF FISH AND GAME**

Case No.: **06CS01451**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for overnight mail with the **GoldenState Overnight Service**. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the overnight courier that same day in the ordinary course of business.

On November 20, 2008, I served the attached **ORDER MODIFYING JUDGMENT** by transmitting a true copy via electronic mail. In addition, I placed a true copy thereof enclosed in a sealed envelope, in the internal mail system of the Office of the Attorney General, for overnight delivery, addressed as follows:

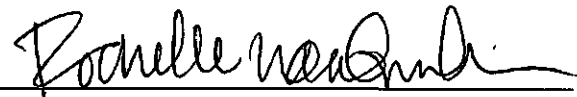
Leah J. Russin, Esq.
Mills Legal Clinic @
Stanford Law School
Crown Quadrangle
559 Nathan Abbott Way
Stanford, CA 94305-8610
E-mail Address:
LeahRussin@law.stanford.edu

Deborah A. Sivas, Esq.
Mills Legal Clinic @
Stanford Law School
Crown Quadrangle
559 Nathan Abbott Way
Stanford, CA 94305-8610
E-mail Address:
dsivas@stanford.edu

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on November 20, 2008, at Sacramento, California.

Rochelle Uda-Quillen

Declarant



Signature